The injustices of using an average

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SECTION 9-19-38 of Chapter 335 of the General Laws of Rhode Island states in part that admissible evidence of the work-life expectancy of an individual shall be the number of years indicated in the most recent tables of "Work Life Estimates: Effects of Race and Education" as published by the U.S. Department of Labor's Bureau of Labor Statistics.

The section further states that other evidence, such as "health, constitution, habits, or occupation" may also be admitted. These "other" categories may have the effect of either reducing or increasing the work-life expectancy. Work-life expectancy is defined in the study as the average number of years a person of a given age and education level will be active in the labor force. The tables that are cited in Section 9-19-38 supply those averages and are published in Bulletin 2254 of the U.S. Department of Labor, Bureau of Labor Statistics.

To me, the use of these averages is troubling in the endeavor to make an individual in litigation economically whole. As a single representation, an average may be useful for a large group, but for an individual it is virtually a meaningless number.

For example, as of January 2007, the average monthly Social Security benefit that will be paid to about 33 million retired workers is $1,044. However, the monthly benefit will be $632 for a person who retires in 2007 and begins benefits in the month following the 62nd birthday and had always worked at low wages. (Social Security defines low wages as 45 percent of the National Average Wage Index.)

Given the actual benefit, how significant is the average benefit of $1,044 to this individual? My answer is that it is of no significance whatsoever. It is the individual situation — not the average — that is the meaningful criteria for the Social Security benefits. I am making the same argument for lost wages.

The Bureau of Labor Statistics tables were generated from data developed by the Bureau of the Census in the Current Population Survey in January, March, May, July, September and November of 1979 and the same individuals in the same months in 1980. A total of about 255,000 individuals whose ages ranged from 16 to 75 were surveyed.

With this information, the bureau's statisticians were able to determine the probabilities at each age of the number entering, leaving, and re-entering the workforce and then extend the analysis to estimate work-life expectancies. I have no quarrel with the statistical development, and the resulting averages are probably as accurate as life expectancy tables when applied to a large cohort of people. Should they be applied to an individual?

Consider a 40-year-old woman with "15 or more" years of education and currently in the work force. The bureau's tables indicate a life expectancy of 39.9 years and a work- life expectancy of 18 years. The tables do not give guidance to which of the 18 years between age 40 and age 62, the earliest elective retirement age under Social Security, or to age 67, the normal retirement age of today's 40-year-old.

If the work history of this woman has been impeccable, would it not be reasonable to assume that she would continue to work until she elected to retire, unless she is forced to stop due to illness or the act of a second party? However, the use of these tables in litigation, and an assumption of continuous work, implies that she would have worked until age 58, about four years before she could electively retire under Social Security and nine years before her Social Security Normal Retirement Age, under current law.

Let us assume that her annual post-income-tax earnings are $50,000 and would have increased by 3 percent a year. (The Supreme Court held, in *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490 (1980), that income taxes should be subtracted from projected earnings.) The maximum lost wages to which she would be entitled over those 18 years would be computed as about $765,749. This number represents, in today's dollars, a total post-income-tax wages of about $1,170,722, reduced by a survival probability each year to about $1,166,801, and further reduced by a 5 percent interest rate — the assumption being that the funds would be invested at that rate of return to provide her with an annual income equivalent to the probable lost wages.

This $765,749 award is supposed to make her economically whole. In the 1983 U.S. Supreme Court decision in *Jones & Laughlin Steel Corporation v. Pfeifer*, 462 U.S. 523 (1983), Justice Stevens wrote that "any lump sum represents only a 'rough and ready' effort to put the plaintiff in the position he would have been in if not injured." Given attorneys' fees to recover the "rough approximation" of those lost earnings, the person can never be placed in the "position he would have been if not injured," unless the award is increased by those fees.

Although she might be eligible for disability benefits under Social Security, those funds are precluded from consideration by the Supreme Court ruling in *Flemming v. Nestor*, 363 U.S. 603 (1960). Also in *Richardson v. Belcher*, 404 U.S. 78 (1971), the Supreme Court held that "no right in Social Security benefits exist and projections of lost Social Security benefits should not be made in federal cases."

I submit that the use of work-life-expectancy tables would not normally be appropriate to the following workers:

Judges in state and federal courts; tenured professors; tenured federal Civil Service employees; tenured public-school teachers; tenured state and municipal workers (with no-lay-off contracts) and some non-tenured profes-

sions, including physicians, nurses, lawyers, stockbrokers, accountants and religious leaders who might never voluntarily and prematurely exit the work force.

For the work force that is governed by labor contracts, those contracts, such as that of the United Auto Workers, may provide for income during lay-off periods, and for the rest of the work force, there is unemployment compensation.

The tables imply that the 40-year-old female would be out of work for between four and nine years between her current age and the elective Social Security retirement ages (62 to 67). At one extreme, a trial judge could rule that she would have left the workforce in the current year to return between four or nine years and continue to work without interruption to between ages 62 and 67.

At the other extreme, another trial judge could rule that she would have worked the next 18 years without interruption, leave the workforce permanently and apply for Social Security benefits between ages 62 and 67.

I argue that neither extreme, nor any combination between the extremes, would be a reliable representation of an individual's future work history. The importance of such reliability is indicated in the U.S. Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), where in Part II-B it is stated that ". . . under the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."

It is this requirement of work-life reliability that presents the difficulty in ascertaining a true work life. If a person's work career is interrupted due to the action of another person, then in my opinion justice would be served only if a trial judge presumes that the injured party would have worked continuously until his or her normal retirement age under Social Security or to a contractual earlier age that was not in violation of the Age Discrimination Act of 1967, and that the worker would have survived to that age.

The list of workers I have cited above attests to that reliability and was the position that the Bureau of Labor Statistics took prior to its first study of the work patterns of Americans. It is analogous to the fact that life annuities and life-insurance premiums are determined using ages at the ends of mortality tables, not to the life expectancies of the individuals, which are far less than the ages of 110 to 115 that are the ends of the tables. The probability that a 40-year-old female will survive to age 67 is about 87 percent. If the law were to be so amended, then the 40-year-old female, above, would have been presumed to work the following 27 years for total post-income-tax wages of $3,780,418 whose value in current dollars at a 5 percent interest rate would be $1,701,903 — about $936,153 greater than that which would have been provided using work-life expectancy tables — and she would still not be economically whole due to attorneys' fees.

Rhode Island state Sen. Teresa Paiva-Weed has proposed the modification of Section 9-19-38 of Chapter 335 of the Public Laws of Rhode Island.

If state law may take precedence in defining reliability, I respectfully urge her to lead a further re-modification of that section to read that an injured party, who is then currently in the work force, will be presumed to work and survive until his or her normal retirement age under Social Security or to a legally mandated retirement age, and that work-life tables be used only as a last resort, in an endeavor to make a person economically whole. Not being an attorney, I did not find other cases that may be pertinent to this discussion, and if there are any, I apologize for the oversight, but my premise remains. An average that applies to a large cohort of people should not be used when only an individual is involved.

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